

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 FRANCISCO PERALTA ZAMORA,) No. CV 13-8955-AS
12)
13 Plaintiff,)
14 v.) MEMORANDUM AND OPINION
15)
16 CAROLYN W. COLVIN,)
17 Acting Commissioner of the)
18 Social Security Administration,)
19 Defendant.)
20

21 PROCEEDINGS
22
23

24 On December 4, 2013, Plaintiff Francisco Peralta Zamora filed a
25 Complaint seeking review of the denial of his application for a
26 period of disability, disability insurance benefits, and supplemental
27 security income. (Docket Entry No. 3.) In January 2014, shortly
28 after service of the Complaint, the parties consented to proceed
before a United States Magistrate Judge. (Docket Entry Nos. 9, 10.)
Defendant then filed an Answer to the Complaint and the
Administrative Record ("A.R.") on May 2, 2014. (Docket Entry

1 Nos. 12, 13.) On July 24, 2014, the parties filed a Joint
2 Stipulation setting forth their respective positions regarding
3 Plaintiff's claim. (Docket Entry No. 17.) The Court has taken the
4 matter under submission without oral argument, and it is now before
5 the Court for decision. See C.D. Cal. L.R. 7-15.

6
7 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**
8

9 Plaintiff filed applications for a period of disability,
10 disability insurance benefits, and supplemental security income on
11 September 23, 2009, alleging disability commencing on March 24, 2009.
12 (A.R. 285-93.) Plaintiff alleges physical impairments as the result
13 of a stroke. (Joint Stip. 3.) His main complaint is that he suffers
14 from diplopia, commonly referred to as double vision. (See A.R. 21;
15 Joint Stip. 4.)
16

17 After the Commissioner initially denied Plaintiff's claims,
18 Plaintiff requested a de novo hearing before an Administrative Law
19 Judge ("ALJ"). The ALJ, Edward P. Schneeberger, held four hearings
20 on the matter. (A.R. 28-110.) At the first hearing, on February 10,
21 2011, the ALJ offered Plaintiff resources to obtain counsel.
22 (A.R. 28-37.) Plaintiff obtained counsel and the second hearing was
23 held on June 29, 2011. (A.R. 38-60.) Plaintiff and a vocational
24 expert ("VE"), Freeman Leeth, testified. (Id.) At the end of the
25 hearing, the ALJ ordered Plaintiff to see a psychologist to determine
26 the extent of the damage to Plaintiff's cognitive functioning.
27 (A.R. 57-60.) On January 25, 2012, the ALJ held the third hearing on
28

1 this matter, where Plaintiff once again testified along with
2 neurologist Dr. James Haines. (A.R. 92-110.) Based on Dr. Haines'
3 recommendation, the ALJ ordered Plaintiff to see an ophthalmologist
4 to undergo a diplopia filed red lens test. (A.R. 108.) The final
5 hearing was held on August 24, 2012. Plaintiff, VE Irma Bebe, and
6 ophthalmologist Dr. Patrick McCafferty testified at the final
7 hearing. (A.R. 61-91.)
8

9 On September 27, 2012, the ALJ issued an unfavorable decision.
10 (A.R. 10-27.) The ALJ found that Plaintiff has severe impairments as
11 a result of a stroke, including headaches, significant right facial
12 weakness, and some right-sided sensory deficits. (A.R. 19.) But the
13 ALJ found that Plaintiff's alleged diplopia is a non-severe
14 impairment. (Id.) The ALJ found that Plaintiff has been prescribed
15 corrective lenses and prisms to improve his double vision, and
16 Plaintiff's alleged level of vision is inconsistent with the degree
17 of pathology. (Id.) In reaching these conclusions, the ALJ made an
18 adverse credibility finding with regard to Plaintiff's allegations of
19 the intensity, persistence, and limiting effects of his physical
20 symptoms. (A.R. 20-22.)
21

22 The ALJ determined that Plaintiff retained the residual
23 functional capacity ("RFC") to perform a full range of work at all
24 exertional levels, but with the non-exertional limitations that he
25 cannot work around unprotected heights or moving machinery.
26 (A.R. 22.) Relying on the testimony of VE Leeth and VE Bebe, the ALJ
27 determined that Plaintiff was able to perform his past relevant work
28

1 as an assembler, DOT No. 827.684-010, as actually and generally
2 performed. (Id.) Accordingly, the ALJ found that Plaintiff was not
3 disabled under section 216(i) and 223(d) of the Social Security Act.
4 (A.R. 22.)

5
6 **PLAINTIFF'S CONTENTION**

7
8 Plaintiff contends that the ALJ failed to provide specific and
9 legitimate reasons for rejecting his testimony. (Joint Stip. 4.)

10
11 **STANDARD OF REVIEW**

12
13 This court reviews the Administration's decision to determine
14 if: (1) the Administration's findings are supported by substantial
15 evidence; and (2) the Administration used proper legal standards.
16 Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996). "Substantial
17 evidence is more than a scintilla, but less than a preponderance."
18 Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995). To determine
19 whether substantial evidence supports a finding, "a court must
20 consider [] the record as a whole, weighing both evidence that
21 supports and evidence that detracts from the [Commissioner's]
22 conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998).
23 As a result, "[i]f evidence can reasonably support either affirming
24 or reversing the ALJ's conclusion, [a] court may not substitute its
25 judgment for that of the ALJ." Batson v. Comm'r of Soc. Sec. Admin.,
26 359 F.3d 1190, 1196 (9th Cir. 2004).

APPLICABLE LAW

"The Social Security Act defines disability as the 'inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.'" Webb v. Barnhart, 433 F.3d 683, 686 (9th Cir. 2005) (quoting 42 U.S.C. § 423(d)(1)(A)). The ALJ follows a five-step, sequential analysis to determine whether a claimant has established disability. 20 C.F.R. § 404.1520.

At step one, the ALJ determines whether the claimant is engaged in substantial gainful employment activity. Id. § 404.1520(a)(4)(i). "Substantial gainful activity" is defined as "work that . . . [i]nvolves doing significant and productive physical or mental duties[] and . . . [i]s done (or intended) for pay or profit." Id. §§ 404.1510, 404.1572. If the ALJ determines that the claimant is not engaged in substantial gainful activity, the ALJ proceeds to step two which requires the ALJ to determine whether the claimant has a medically severe impairment or combination of impairments that significantly limits her ability to do basic work activities. See id. § 404.1520(a)(4)(ii); see also Webb, 433 F.3d at 686. The "ability to do basic work activities" is defined as "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. § 404.1521(b); Webb, 433 F.3d at 686. An impairment is not severe if it is merely "a slight abnormality (or combination of slight abnormalities) that

1 has no more than a minimal effect on the ability to do basic work
2 activities." Webb, 433 F.3d at 686.

3
4 If the ALJ concludes that a claimant lacks a medically severe
5 impairment, the ALJ must find the claimant not disabled. Id.;
6 20 C.F.R. § 1520(a)(ii); Ukolov v. Barnhart, 420 F.3d 1002, 1003 (9th
7 Cir. 2005) (holding that the ALJ need not consider subsequent steps
8 if there is a finding of "disabled" or "not disabled" at any step).

9
10 However, if the ALJ finds that a claimant's impairment is
11 severe, then step three requires the ALJ to evaluate whether the
12 claimant's impairment satisfies certain statutory requirements
13 entitling her to a disability finding. Webb, 433 F.3d at 686. If
14 the impairment does not satisfy the statutory requirements entitling
15 the claimant to a disability finding, the ALJ must determine the
16 claimant's RFC, that is, the ability to do physical and mental work
17 activities on a sustained basis despite limitations from all her
18 impairments. 20 C.F.R. § 416.920(e).

19
20 Once the RFC is determined, the ALJ proceeds to step four to
21 assess whether the claimant is able to do any work that she has done
22 in the past, defined as work performed in the last fifteen years
23 prior to the disability onset date. If the ALJ finds that the
24 claimant is not able to do the type of work that she has done in the
25 past or does not have any past relevant work, the ALJ proceeds to
26 step five to determine whether—taking into account the claimant's
27 age, education, work experience, and RFC—there is any other work that

1 the claimant can do and if so, whether there are a significant number
2 of such jobs in the national economy. Tackett v. Apfel, 180 F.3d
3 1094, 1098 (9th Cir. 1999); 20 C.F.R. § 404.1520(a)(4)(iii)-(v). The
4 claimant has the burden of proof at steps one through four, and the
5 Commissioner has the burden of proof at step five. Tackett, 180 F.3d
6 at 1098.

8 DISCUSSION

9
10 After consideration of the record as a whole, the Court finds
11 that the Commissioner's findings are supported by substantial
12 evidence and are free from material¹ legal error.

14 A. The ALJ Did Not Err in Evaluating Plaintiff's Credibility

15
16 Plaintiff challenges the ALJ's credibility assessment of the
17 severity of his symptoms, emphasizing that the evidence proved
18 Plaintiff's significant vision problems. (Joint Stip. 5.) Moreover,
19 while the ALJ properly identified the two-step credibility process,
20 Plaintiff argues that the ALJ "never articulated a *single* reason" for
21 finding Plaintiff not credible. (Id.) But the Court finds that the
22 ALJ properly articulated reasons for finding Plaintiff not credible.

23
24 ¹ The harmless error rule applies to the review of
25 administrative decisions regarding disability. See McLeod v. Astrue,
26 640 F.3d 881, 886-88 (9th Cir. 2011); Burch v. Barnhart, 400 F.3d
27 676, 679 (9th Cir. 2005) (stating that an ALJ's decision will not be
28 reversed for errors that are harmless).

1 1. Legal Standard

2
3 An ALJ's assessment of symptom severity and claimant credibility
4 is entitled to "great weight." See Anderson v. Sullivan, 914 F.2d
5 1121, 1124 (9th Cir. 1990); Nyman v. Heckler, 779 F.2d 528, 531 (9th
6 Cir. 1985). "[T]he ALJ is not required to believe every allegation
7 of disabling pain, or else disability benefits would be available for
8 the asking, a result plainly contrary to 42 U.S.C. § 423(d)(5)(A)." Molina v. Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012).
9

10
11 In evaluating a claimant's subjective symptom testimony, the ALJ
12 engages in a two-step analysis. Lingenfelter v. Astrue, 504 F.3d
13 1028, 1035-36 (9th Cir. 2007). "First, the ALJ must determine
14 whether the claimant has presented objective medical evidence of an
15 underlying medical impairment which could reasonably be expected to
16 produce the pain or other symptoms alleged." Id. at 1036 (internal
17 quotations and citation omitted). If such objective medical evidence
18 exists, the ALJ may not reject the claimant's testimony "simply
19 because there is no showing that the impairment can reasonably
20 produce the *degree* of symptom alleged." Smolen, 80 F.3d at 1282
21 (emphasis in original). Instead, in finding the claimant's
22 subjective complaints not credible, the ALJ must make "specific,
23 cogent" findings that support the conclusion. Lester v. Chater, 81
24 F.3d 821, 834 (9th Cir. 1995) (quoting Rashad v. Sullivan, 903 F.2d
25 1229, 1231 (9th Cir. 1990)). Absent affirmative evidence of
26 malingering, the ALJ's reasons for rejecting the claimant's
27 testimony must be "clear and convincing." Lester, 81 F.3d at 834.
28

2. Affirmative Evidence of Malingering

Defendant argues that the Court should affirm the ALJ's decision because there is affirmative evidence of malingering in this case. (Joint Stip. 7.) As Defendant points out, the ALJ placed "considerable weight" on the diagnosis from the consultative psychologist, Dr. Ahmad Riahinejad. (A.R. 21-22.) Dr. Riahinejad evaluated Plaintiff's mental impairment as a result of the stroke and included in his diagnosis that Plaintiff was malingering with respect to alleged mental impairment. (A.R. 21, 464-77.) According to Dr. Riahinejad, Plaintiff did not put forth his best effort during diagnostic testing in August 2011. (*Id.*)

Where there is affirmative evidence of malingering, the ALJ is not required to provide "clear and convincing" reasons to reject Plaintiff's subjective statements. See Lester, 81 F.3d at 834. Thus, as Defendants argue, because the ALJ sufficiently explained and placed "considerable weight" on Dr. Riahinejad's opinion that Plaintiff was malingering, this Court's review of the ALJ's credibility findings need not go any further. (Joint Stip. 7; A.R. 21-22.) The Court agrees. While Dr. Riahinejad's examination of Plaintiff was for mental impairment, his diagnosis of malingering is indicative of Plaintiff's overall credibility with respect to his overall symptoms. See Medel v. Colvin, No. EDCV 13-2052-JPR, 2014 WL 6065898, at *8 (C.D. Cal. Nov. 13, 2014) ("[T]he ALJ was entitled to reject Plaintiff's testimony without providing clear and convincing reasons because she specifically found that 'the record

1 includes statements by a doctor suggesting [Plaintiff] was engaged in
2 possible malingering or misrepresentation.").

3
4 3. Objective Medical Evidence

5
6 Nevertheless, even if Dr. Riahinejad's malingering diagnosis is
7 insufficient on its own, the diagnosis along with the ALJ's reliance
8 on additional objective medical evidence suffice as "clear and
9 convincing" reasons for the ALJ's adverse credibility finding.

10
11 In addition to Dr. Riahinejad's examination, the ALJ also
12 credited the opinions of nondisability from the other consultative
13 examiners and medical experts. (A.R. 19-22, 73-78, 101-07, 464-77,
14 511-13.) Dr. Haines testified to Plaintiff's exertional limitations,
15 which the ALJ stated "put to rest any concerns about lifting and
16 carrying." (A.R. 21, 105.) With respect to the diplopia, the
17 results of the ophthalmological examination ordered by the ALJ
18 indicated that Plaintiff's alleged level of vision was not consistent
19 with the degree of pathology and that his vision was closer to 20/20.
20 (A.R. 511-13.) Moreover, Dr. McCafferty testified at the last
21 hearing that Plaintiff's alleged double vision can be offset by head
22 positioning and improved with the use of prisms. (A.R. 21, 73-78.)
23 Dr. McCafferty also testified that patching one eye for periods of
24 time would help correct the problem during work. (Id.)

25
26 The Court also notes that the ALJ's credibility findings did not
27 entirely reject Plaintiff's subjective symptoms, particularly with

1 respect to his vision problems. The RFC incorporates non-exertional
2 limitations supported by the record—Plaintiff cannot work around
3 unprotected heights or moving machinery. (A.R. 22.) Overall, the
4 Court finds that the ALJ rationally interpreted the evidence and
5 articulated “clear and convincing” reasons for discounting the
6 severity of Plaintiff’s subjective symptoms including his alleged
7 diplopia. See Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th
8 Cir. 2001) (holding that the opinions of examining doctors and
9 medical experts can serve “as substantial evidence supporting the
10 ALJ’s findings with respect to [the claimant’s] physical impairment
11 and exertional limitations”); Morgan v. Comm’r of Soc. Sec. Admin.,
12 169 F.3d 595, 600-01 (9th Cir. 1999) (holding that a medical expert’s
13 testimony constitutes substantial evidence where he provides a
14 specific rationale and narrative justifying his opinion that is
15 consistent with other evidence in the record); Matthews v. Shalala,
16 10 F.3d 678, 680 (9th Cir. 1993) (holding that the ALJ properly
17 discounted the claimant’s allegations where no doctor “expressed the
18 opinion that [the claimant] was totally disabled” or “implied that
19 [the claimant] was precluded from *all* work activity”).

20 21 CONCLUSION

22
23 “If the ALJ’s credibility finding is supported by substantial
24 evidence in the record, we may not engage in second guessing.”
25 Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002). Here, the
26 ALJ not only provided specific affirmative evidence of malingering,
27 but he also provided specific, clear and convincing reasons for

1 discounting Plaintiff's statements regarding his subjective symptoms.
2 Therefore, the ALJ's decision that Plaintiff failed to establish
3 disability was properly based upon substantial evidence.
4

5 **ORDER**
6

7 For all of the foregoing reasons, this Court affirms the
8 decision of the Administrative Law Judge.
9

10 LET JUDGMENT BE ENTERED ACCORDINGLY.
11

12 Dated: December 11, 2014.

13 /s/ _____
14 ALKA SAGAR
15 UNITED STATES MAGISTRATE JUDGE
16
17
18
19
20
21
22
23
24
25
26
27
28